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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 675.

HENRY E. BECKER, *Petitioner,*

v.

ROBERT C. SOLOMON, Trustee, Etc., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITATIONS.

CASES:

Maggio v. Zeitz, 333 U. S. 56 (1948) 4, 5, 6

In re Luma Camera Service, Inc., C. A. 2, 157 F. (2d) 951 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Henry E. Becker, the petitioner herein, prays that a writ of certiorari issue to review the final judgment and order of the United States Court of Appeals for the Seventh Circuit, entered as to this petitioner on January 19, 1950, pursuant to a citation for contempt and order of commitment entered in the United States District Court for the Southern District of Illinois, Southern Division, on March 28, 1949.

Opinions Below.

The order of commitment of the District Court is unreported, but appears in the Transcript of Record on Appeal to the Court of Appeals (R. 68-70), which has been made part of the record in this proceeding.

The opinion of the Court of Appeals has been officially reported at 178 F. (2) 819.

The title of the case below was: *In the Matter of Standard Coal Mining & Converters Corporation,* Bankrupt, *Ralph M. Brock and Henry E. Becker,* Appellants, v. *Robert C. Solomon,* Trustee, etc., Appellee.

Jurisdiction.

The opinion and Order of the Court of Appeals affirming the Order of the District Court was entered on November 16, 1949. (R. 84-88) A petition for rehearing was filed with said Court of Appeals on January 5, 1950 (R. 91-94), and was denied by said court on January 19, 1950. (R. 94)

On February 14, 1950, and by order of Associate Justice Sherman Minton, of this Honorable Court, the time within which the petitioner herein might file this petition for a writ of certiorari was extended to March 18, 1950. (R. 98)

The jurisdiction of this Honorable Court is invoked under Section 23(c) of the Bankruptcy Act, as amended by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854, 11 USCA Sec. 47(a); and Section 1254 of the Judiciary Procedure Act of June 25, 1948, c. 646, 62 Stat. 928, 28 USCA, Section 1254(1), effective September 1, 1948.

Questions Presented.

1. Is not the punishment imposed upon this Petitioner by the District Court and approved by the Court of Appeals repugnant to the Fifth Amendment of the Constitution of the United States which forbids deprivation of life, liberty

and property without due process of law, and to the Eighth Amendment of the Constitution which forbids cruel and unusual punishment?

2. Did the trial court err in failing and refusing to conduct a fair and impartial trial on the issue of the Petitioner's then present ability to comply with and obey the turnover order?

3. May a contempt order for failure to comply with a turnover order be substituted for a criminal prosecution so as to deprive a man of his constitutional and otherwise legal right not to be incarcerated for a debt which he begs for leave then to prove he is unable to pay?

Statement.

1. On June 25, 1947, the Standard Coal Mining & Converters Corporation, of which your petitioner was Vice-President, was adjudicated a bankrupt by the United States District Court for the Southern District of Illinois, Southern Division. (R. 6)

2. Thereafter, on the 31st day of August, 1948, an order was entered in the said District Court, by the Honorable Basil H. Coutrakon, Referee in Bankruptcy, finding that the Petitioner herein had in his possession the sum of $19,500 (R. 18, 23, para. 16), and ordering him to turn over that sum within 10 days of the date of service of the order. (R. 24, para. 2) A copy of the order was served on the Petitioner herein on December 20, 1948. (R. 25)

3. On March 8, 1949, there was filed in said District Court a "Referee's Certificate For Contempt For Failure To Surrender Assets", wherein the Referee certified the Petitioner herein to be in contempt of court. (R. 28)

4. On the 28th of March, 1949, proceedings were had in the said District Court, before one of the judges of said court, wherein testimony was taken on the Referee's Certificate of Contempt. (R. 30-67)

5. Counsel for Petitioner herein offered at that time to prove this Petitioner's inability to conform to the order, either at the time of the issuance of the order or at the time it was served on him. Such offer was the testimony of the Petitioner herein as to the disposition made of the money and the fact that he did not at the time of the issuance of the order or at the time of the hearing have possession of or any control over it. On objection by Counsel for the Trustee (R. 36, Pefferle), Counsel for the Petitioner herein was denied the right to introduce such testimony. (R. 41, The Court; 65, Seyfrit; 66, The Court)

6. On the theory that the turnover order was *res adjudicata,* both as to the fact of Petitioner herein having had possession of the said money at the time of the adjudication of bankruptcy and a continuing possession of it up to and through the date of the issuance of the turnover order, the Petitioner herein was adjudged guilty of contempt and committed to jail until such time as he purged himself of the contempt "by paying to Robert C. Solomon, Trustee in Bankruptcy of this Estate, or to the Marshal for his use, the sum of $19,500, and unless he shall sooner be discharged by due process of law." (R. 70)

7. Subsequently, on April 26, 1949, an order was entered in the Court of Appeals reducing the bond to the amount of $10,000, and, on approval of said bail bond, the Petitioner herein was released from custody on May 7, 1949, pending final disposition of this proceeding.

8. The Court of Appeals for the Seventh Circuit, in its opinion on appeal observes the error on the part of the trial court in not permitting the introduction of evidence upon the basis of which the Petitioner herein might have purged himself of the contempt, in accordance with the principles laid down by this Honorable Court in *Maggio* v. *Zeitz* (333 U. S. 56), in the following language:

"We are all admonished by the Supreme Court in the Maggio case, supra, that the enforcement of turnover orders can be resolved only by the good judgment of the trial court, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which would bring discredit to the judicial process.

"At the hearing herein, the trial court seemed reluctant to admit testimony as to what * * * Becker did with the funds withdrawn from bank accounts of bankrupt, apparently on the theory that the turnover order was res adjudicata and could not be collaterally attacked. We agree that such order was res adjudicata, but we are of the view that such testimony was relevant and material." (R. 87-88)

9. Notwithstanding this observance of prejudicial error on the part of the trial court, the Court of Appeals AFFIRMED the lower court. (R. 88-89) A motion for Rehearing and Clarification of the opinion was subsequently denied on January 19, 1950. (R. 94)

Specification of Error.

The court below erred:

In failing and refusing to enter an order quashing the Order of the District Court and remanding the case to that court with directions for further proceedings, in accordance with its observation of a denial of due process by the trial court, in failing and refusing to permit Becker to introduce such proof as he might have in support of his contention that the funds covered by the turnover order were no longer in his possession or under his control.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals is in direct conflict with the decision of this Honorable Court in *Maggio* v. *Zeitz,* 333 U. S. 56. (1948)

2. So long as the decision of the Circuit Court and order of affirmance of the order of the District Court is allowed to stand the Petitioner will be worse off than if he had been criminally prosecuted, in that if indicted for a crime he could not and, presumably, would not have been denied due process as to the right to prove his innocence, whereas now, and in view of the action of the Circuit Court in affirming the action of the trial court in denying him the right to purge himself of the contempt citation, he might never, as a matter of right, be permitted to do so.

3. Unlike the situation as it existed at the time the *Maggio* case was before the Court of Appeals for the Second Circuit, under the title *In Re Luma Camera Service, Inc.* (157 F. 2d 951), the court below was not precluded by precedent from acknowledging the fact that Becker, the Petitioner herein, was being punished for a crime under a fictitious presumption of continuing possession. It had the opinion of this Honorable Court as a guide. By a refusal to follow it the court below brings discredit to the judicial process.

4. In the *Maggio* case, *supra,* the Court of Appeals for the Second Circuit invited (p. 955) and received the aid of this Honorable Court in eliminating the unfortunate results of adhering to that fictitious presumption, while the Circuit Court for the Seventh Circuit seems fixed in its determination to continue to follow the repudiated precedents that deny to this Petitioner the due process spelled out by this Honorable Court in the *Maggio* opinion.

5. There can be no guarantee of due process to this Petitioner other than by the granting of this petition and entry of an Order vacating the judgments below and remanding the case to the District Court for proceedings consistent with the principles laid down by this Honorable Court in the *Maggio* opinion. Without such protective relief by affirmative action of this Honorable Court the Petitioner faces recommitment and an indefinite stay in jail. His release will hinge solely on his ability to establish inability

to conform to the order through a door that was closed to him by the District Court and locked by the Court of Appeals.

Conclusion.

It is respectfully submitted that, for the foregoing reasons, this petition for a writ of certiorari should be granted; the order entered by the court below on November 16, 1949, should be reversed, without oral argument; and the case remanded to the District Court with directions to quash the order of commitment of March 28, 1949; and that your Petitioner have such other and further relief as to this Honorable Court may seem fitting and just in the premises.

JAMES A. COSGROVE,
Attorney for Petitioner.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

STATEMENT.

Standard Coal Mining & Converters Corporation was organized under the laws of the State of Illinois, for the purpose of engaging in the coal mining business. (T. 18.) In the Fall of 1946, it engaged in another venture. It solicited and received cash deposits of approximately $350,000 for the sale of steel. No steel was delivered and the money was not refunded. Nothing was received for the money so advanced by these creditors. (T. 20.)

On May 10, 1947, it was adjudicated a bankrupt by the District Court of the United States, for the Southern Dis-

trict of Illinois, Southern Division, upon an involuntary petition in bankruptcy.

The Trustee after a detailed investigation and examination of the officers of the Bankrupt, filed a petition against Ralph M. Brock, President, and Henry E. Becker, Vice-President of the Company, directors, and principal shareholders who controlled and dominated its affairs and under whose supervision and direction the funds were withdrawn, to account for and turn over to him various moneys withdrawn by them from the Bankrupt Corporation. (T. 8-17.) The Respondents filed their answers to the petition. (T. 18.) The answers are not incorporated in the Record. Extended hearings were had before the Referee at which Respondents were present with their counsel. (T. 18.).

On August 31, 1948, the Referee entered an order (T. 18), wherein he found:

> "During the period from January 1, 1947, to May 10, 1947, checks in sums varying from $1,000.00 to $10,000.00 aggregating over $200,000.00 payable to said Ralph M. Brock, Henry E. Becker, or Cash, were drawn on the Company Bank Account at the City National Bank and cash obtained thereon by the said Ralph M. Brock, Henry E. Becker, or W. W. Blankenship.
>
> The Respondent, Ralph M. Brock, testified in this proceeding as to some of the cash received by him as aforesaid; Henry E. Becker, appeared in person in Court, at the hearing but offered no evidence in opposition to that of the Trustee with reference to said withdrawals. The Court finds that the cash withdrawals of funds from said City National Bank of Chicago, and South East National Bank, the Respondent, Ralph M. Brock has offered no explanation as to the following:
>
> Listing certain exhibits and amounts aggregating $17,500.00 showing withdrawals of $7,300.00 on May 9, 1947, the date of the service of notice of the application for appointment of Receiver, and $6,200.00 two days previously thereto, on May 7, 1947. (T. 21.)

That the Respondent, Henry E. Becker, caused the transfer to himself of funds of the Corporation and has offered no explanation to checks as follows:

Listing Exhibits and amounts aggregating $19,-500.00. All of said cash having been extracted within four months of the filing of the petition in Bankruptcy. (T. 22.)

The Court further finds that said Respondents, Ralph M. Brock and Henry E. Becker, offered no testimony in opposition to the evidence of the Trustee to show that said money was not in their possession at the time of the filing of the petition in bankruptcy, or remains in their possession.

That the said funds above set forth were at the time of the filing of the petition in bankruptcy herein and remain in the possession or under control of said Respondents." (T. 22.)

The order of the Referee required Respondents to turn over the money within ten days after service upon them of a copy of the order. (T. 24.) Respondents' attorney had notice of the order at the time of its entry, but the Trustee was unable to locate Respondents to make personal service of the order until December 20, 1948. (T. 5.)

Respondents failed to comply with the order of the Referee (T. 26, 27), whereupon he certified Respondents to the District Judge for Contempt. (T. 28, 29.)

The Certificate of the Referee to have Respondents held in contempt for their failure to comply with the order of August 31, 1948, came on for hearing before the Honorable Charles G. Briggle on March 28, 1949. (T. 30.) No written answer was filed by Respondents to the Referee's Certificate, but Respondents were present and represented by counsel. (T. 30.) Respondents attempted to purge themselves of the contempt, contending they were unable to comply with the Court's order.

The testimony of Petitioner, Becker, was evasive and incredible. (T. 52-61.) It disclosed that he was financially able to comply with the turn over order. At the time of the contempt order, Becker owned a home in Evanston, Illinois, title to which was in his wife's name. (T. 53.) The District Judge interrogated Becker as to the source of the money to purchase this property but received evasive replies. (T. 59.) In addition, he owns four (4) parcels of improved real estate at Carlinville, Illinois, tenanted by a tavern, ice cream shop, barber shop, fruit shop, etc., (T. 53, 54), and also "a lot of patents" issued by the Federal Government and are "secrets and cannot be disclosed." (T. 55.)

No evidence was offered by Becker to show that any disposition was made by him of the specific money that the Referee found was in his possession on August 31, 1948. He was afforded full opportunity to do so.

The Court found:

> "I am convinced beyond reasonable doubt each of these Defendants has knowingly and wilfully failed to comply with a proper order of the Referee as disclosed in this proceeding, and that they are guilty of Contempt of Court by reason of their failure to respond to this Order." (T. 65.)

The District Court on March 29, 1949, committed Petitioner to the custody of the Attorney General for confinement in jail until he shall purge himself of his Contempt unless he shall sooner be discharged by due process of law. (T. 68, 69.)

The Petitioners, Becker and Brock, prosecuted a joint appeal from the Order to the United States Circuit Court of Appeals for the Seventh Circuit.

Petitioner was released from custody on bail on May 7, 1949.

The Circuit Court of Appeals affirmed the Order of the District Court. Brock filed his separate Petition for a Writ of Certiorari in this Court as Case No. 614. This Petition raised substantially the same questions as are set forth in the present Petition of Becker.

PROPOSITIONS OF LAW RELIED UPON.

1.

The decision of the Circuit Court of Appeals is not in conflict but in accord with the decision of this Honorable Court in *Maggio* v. *Zeitz*, 333 U. S. 56.

2.

The sole Specification of Error relied upon by Petitioner (p. 5 of his Petition) is that the Circuit Court of Appeals failed and refused "to permit Becker to introduce such proof as he might have in support of his contention that the funds covered by the turnover order were no longer in his possession or under his control."

This statement is refuted by the opinion of the Court of Appeals which specifically affords him such opportunity. Transcript of Record page 88.

3.

The Fifth Amendment of the Constitution of the United States which forbids deprivation of life, liberty and property without due process of law has no application. Petitioner was afforded a full hearing upon an issue made by a Petition filed by the Trustee in Bankruptcy and his answer thereto and was represented by eminent and able counsel. The Constitutional prohibition does not take away the power of a Court to commit to jail for contempt.

4.

The Eighth Amendment of the Constitution which forbids cruel and unusual punishment has no application. The Court found that Petitioner willfully refused to comply

with a lawful order of the Court. The record amply supports the finding of the Court and that he possessed property showing ability to comply with the Order. The decision of the Court of Appeals affords him further opportunity to prove inability to comply. If Petitioner does not show his inability to comply with the turnover order, he does not meet the issue.

Maggio v. *Zeitz,* 333 U. S. 56 at pp. 75, 76 (and cases there cited).

5.

Due regard should be given to the Trial Court to judge the credibility of the witnesses and his findings of fact should not be set aside unless clearly erroneous.

Rule 52 (a), Federal Rules of Civil Procedure.

6.

Courts have inherent power to compel obedience to a lawful judicial order by imprisonment for contempt.

Maggio v. *Zeitz,* 333 U. S. 56.

7.

Where the Bankrupt asserts his inability to comply with the turnover order and the Trial Court finds that the denials are incredible in context, the commitment for contempt should be sustained.

Maggio v. *Zeitz,* 333 U. S. 56.

8.

The burden of showing inability to comply with the turnover order was upon Petitioner, a fiduciary.

Maggio v. *Zeitz,* 333 U. S. 56.

Wylie v. *Bushnell,* 277 Ill. 484, 506, 507.

Nonnast v. *Northern Trust Co.,* 374 Ill. 248, 261.

ARGUMENT.

The Trustee in Bankruptcy on behalf of the creditors who were cheated and defrauded of upwards of $350,000, and all other creditors of said Estate, opposes the Petition. There are no special or important reasons specified in the Petition as are required by Rule 38 (5) of this Court.

The Petition is based upon the contention that the decision of the Circuit Court of Appeals is in conflict with the opinion of this Court in *Maggio* v. *Zeitz,* 333 U. S. 56.

The decision of the Circuit Court of Appeals is in full accord with the opinion of this Court in the *Maggio* case. This Court in the *Maggio* case said (333 U. S. at p. 75):

> "the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession."

This Court further held in the *Maggio* case that the Bankrupt did not meet this issue "by his own denials which the Court finds incredible in context."

The Circuit Court of Appeals with respect to the testimony of Petitioner states:

> "In many respects their testimony was vague, uncertain and unsatisfactory, especially as to the exact nature and amount of assets formerly owned by each of them. The trial Judge had the opportunity to observe appellants upon the witness stand and we must accept his judgment as to their credibility. The Court

announced he was convinced beyond a reasonable doubt that Brock and Becker knowingly and wilfully failed to comply with the Referee's turn-over order. He made findings that on August 31, 1948, the date of the turn-over order, * * * Becker had in his possession $19,500. of funds belonging to the bankrupt." (T. 86.)

The Court further stated:

"Under the state of the record, as we find it before us, sufficient evidence sustains the trial court's finding, and we must affirm its judgment, but that does not mean that Brock and Becker must necessarily spend the rest of their days in jail if they are never able to comply with the turn-over order. We have progressed considerably from the time when imprisonment for debt was commonplace. After a reasonable interval has elapsed, Brock and Becker may again seek to show the court their inability to comply with the turn-over order. *Maggio* v. *Zeitz, supra,* p. 72. On such a hearing, they should be prepared to make definite and accurate answers as to what was done with the assets formerly owned by the bankrupt and transferred to them, as well as their own assets." (T. 86.)

Under the decision of the Circuit Court of Appeals, Petitioner is afforded a full opportunity to show by credible evidence that he is unable to comply with the turn-over order. The Court further said:

"If the funds withdrawn from the bank accounts of the bankrupt are still intact and in the possession of or obtainable by the appellants, the court would be justified in keeping them in jail until they complied with the turn-over order. However, if proof can be made that said funds are in truth no longer available, this fact would have an important relation to appellants' present ability to comply with the turn-over order, and determine whether the terms of the order of commitment for contempt that each appellant be committed to jail 'until he shall purge himself of his said contempt' should be modified, or the commitment va-

> cated, and Brock and Becker released. But until such time, the order shall stand and it is hereby AFFIRMED." (T. 88.)

The rules of law laid down in the opinion of the Circuit Court of Appeals are based upon and in accord with the principles asserted by this Court in the *Maggio* case.

No explanation was made by Petitioner as to what disposition he made of the funds which he wrongfully appropriated immediately preceding the filing of the petition in bankruptcy and which were in *custodia legis,* and should have been turned over to the Receiver. To merely state he does not have the funds does not end the controversy.

Rule 52 (a) of the Federal Rules of Civil Procedure provides among other things:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the trial court to judge of the credibility of the witnesses."

To no type of case is this last clause more appropriately applicable than to the one herein, where the evidence of Petitioner is evasive and incredible, deliberately staged to conceal his present holdings and property and to give the false impression that the money withdrawn from the bank was dissipated and is not now in his possession.

No "presumption" need be indulged in and no resort to "fiction" is required to visualize that on the day the Receiver was appointed the Petitioner had in his possession $19,500.00 which belonged to, and was the property of the Receiver, and should have been turned over to the Receiver.

No explanation has ever been given as to the whereabouts of said funds or what was done with said funds except the bald statement that they are not in his possession.

He had ample opportunity to show his inability to comply with the turn-over order. No showing was made.

The Circuit Court of Appeals has afforded Petitioner the opportunity to show his inability to comply with the turn-over order. Petitioner, however, has chosen to conduct a series of extensive and expensive hearings and defenses in his efforts to avoid an accounting of the funds wrongfully withdrawn by him.

Imprisonment to compel obedience to a lawful judicial order has not yet ceased, and ought not to cease. To hold otherwise would destroy all respect for the Courts by stripping them of power to enforce their lawful decrees. Such power is inherent in all Courts.

The findings of the Referee, affirmed by the learned Judge, discrediting the excuses offered, and affirmed by the Circuit Court of Appeals require the acceptance by this Court of the conclusions reached by the Referee, the Judge, and the Circuit Court of Appeals.

The grounds presented in support of the Petition are clearly without merit and the Petition should be denied.

Respectfully submitted,

HARRY J. MYERSON and
LESLIE G. PEFFERLE,
Attorneys for Respondent, Robert C. Solomon, Trustee, etc.

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No. 675.

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v.

ROBERT C. SOLOMON, Trustee, Etc., *Respondent.*

PETITIONER'S REPLY BRIEF.

Respondent's brief in opposition to the petition for writ of certiorari, in the subject case, is not directed to the main point at issue, namely, the denial of due process by the District Court and, notwithstanding an observance of such denial, an affirmance and reaffirmance thereof by the Court of Appeals (R. 66, 88, 94).

In the first paragraph of the Statement, Respondent recites facts which have no bearing on the issue here and, presumably, there recited to poison the mind of this Honorable Court with irrelevant facts which, if sustained in a proper proceeding in the court of first instance, might have been made the basis of appropriate civil actions by the injured parties, or of appropriate criminal proceedings in

the District Court, under the criminal code. Another injection of this venom is to be found in the first paragraph of the Argument.

Respondent recites that it was:

> "disclosed that he (Becker) was financially able to comply with the turn-over order. At the time of the contempt order, Becker owned a home in Evanston, Illinois, title to which was in his wife's name." (p. 4)

The Court is not informed, however, that the home was bought by Mrs. Becker, "direct from a G. I.", long before any bankruptcy proceedings (R. 53). The same with respect to the time of purchase of "four (4) parcels of improved real estate at Carlinville, Illinois, tenanted by a tavern, ice cream shop, barber shop, fruit shop, etc." (p. 4), citing (T. 53-54), and all of which were subject to heavy purchase-money mortgages (R. 53-54).

Respondent states that: "The Petitioner, Becker, was evasive and incredible." (p. 4)

Evasive and incredible as to what testimony? Was it the irrelevant and immaterial testimony extracted on cross examination and permitted by the trial court, or was it the testimony as to what disposition Becker had made of the abstracted funds and found by the Court of Appeals to be "relevant and material", but which the trial court refused to admit or listen to and rejected in the following language:

> "Well, I have already ruled, Mr. Seyfrit, that I would not let you offer evidence to show what became of those checks that the Referee has specifically found and traced into the possession of the Respondents." (R. 66)

Surely, the reference is not to the clear and unequivocal testimony of Becker, as follows:

> BECKER, appearing as a witness in his own behalf, having been duly sworn, testified as follows: (R. 52)
> Mr. Seyfrit. Do you have any money or assets

from which money could be derived or any credit where you could get money to pay this Order or any part of it at this time, today?

A. I have borrowed to the limit. I don't know where.

Q. You can answer this question yes or no. Can you pay any part of it now?

A. I don't think so, sir.

Q. Are you in debt at the present time?

A. Yes, sir. I owe close to a half million dollars: (R. 57)

When the Trustee instituted the contempt proceeding, he tendered an issue of contemnor's then present wilful disobedience to the order. This issue should have been tried just as any other factual issue, and the court should have admitted and considered all testimony and evidence relevant to it. (*Maggio* v. *Zeitz*, 333 U. S. 56, 74)

The burden in such a proceeding is on the Trustee to prove by clear and convincing evidence that the property abstracted from the bankrupt estate is then in the possession or under the control of the party being proceeded against (id. 64).

The Trustee offered no evidence or testimony whatsoever as to what, if any, portion of the abstracted funds were in the hands of Becker at the time of the contempt proceeding. He came into court relying on the "continuing in possession" theory and seeking a conviction for contempt, regardless of the contemnor's then present inability to conform with the turn-over order. His position was sustained by the trial court (R. 66), and affirmed (R. 88) and re-affirmed (R. 94) by the Court of Appeals.

Respondent informs us that the court below "has afforded Petitioner the opportunity to show his inability to comply with the turn-over order." (p. 11)

Petitioner concedes that the decision of that court contains a subtle suggestion that he slither back to the District Court and enter in a posture no higher than his knees and, perchance the trial court has had a penitent change of heart or pang of conscience, he may be accorded due

process within the purview of the decision of this Honorable Court, as expressed in the *Maggio* decision. And this notwithstanding the affirmance and re-affirmance of the prior denial.

Petitioner is not asking for such meaningless suggestion or invitation. He seeks only a guaranteed right to be permitted to establish impossibility of performance in strict accordance with due process.

Respondent volunteers the inferences that;

> "No explanation has ever been given as to the whereabouts of said funds or what was done with said funds except the bald statement they are not in his possession. He had ample opportunity to show his inability to comply with the turn-over order. No showing was made." (pp. 10-11)

In the light of the statement of the District Court: "*Well, I have already ruled, Mr. Seyfrit, that I would not let you offer evidence as to what became of those checks,*" etc., it is not surprising to find that there are no citations to the record that might tend to elevate those inferences to the status of facts. (R. 66; *Italics supplied.*)

Respondent, at this point, seems to be banking on the dubious assumption that this Honorable Court will not take cognizance of the offer of such testimony on behalf of Brock, one of the contemnors, and the objection to such testimony by Mr. Pefferle (R. 36), attorney for the Trustee there and here, which objection was sustained by the trial court (R. 41); the renewal of the offer on behalf of Brock and Becker (R. 65); and the reiteration by the trial court of its refusal to admit or listen to such testimony on behalf of either of the contemnors (R. 66); and to all of which the attention of this Honorable Court was directed by appropriate citation in the petition herein. (p. 4, Para. 5)

Conclusion.

Petitioner respectfully represents that the sole issue before the Court of Appeals was the question of law arising by reason of the District Court having denied to this Petitioner the right to establish his then present inability to conform to the turn-over order.

The sole issue before this Honorable Court is the question of the propriety of the Court of Appeals in affirming and re-affirming the action of the District Court, in that regard, and sustaining the order of commitment of this Petitioner, notwithstanding its observance of a clear and unmistakable denial of due process.

The petition should be granted; the court below reversed; and the Petitioner accorded not less than the undeniable right to go back to the District Court as a free man seeking justice, and not that of a criminal in shackles pleading for mercy from a court that has already denied him a fair trial with the approval of the Court of Appeals.

Respectfully submitted,

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